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In the Supreme Court of the United States

October Term, 1958

No. 126

MISSOURI PACIFIC RAILROAD COMPANY, PETITIONER

v.

THE UNITED STATES

On Petition for a Writ of Certiorari To the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the United States District Court for the Southern District of Texas (R. 22-25) are not reported. The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. A) is reported at 250 F. 2d 805.

JURISDICTION

The judgment of the Court of Appeals was entered on January 14, 1958 (R. 39). A timely petition for rehearing was denied on March 12, 1958 (R. 44).

Leave to file a second petition for rehearing was granted on March 27, 1958 (R. 62). The second petition for rehearing was denied on May 22, 1958 (R. 79). The petition for a writ of certiorari was filed on June 25, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the administrative deduction, authorized by Section 322 of the Transportation Act of 1940, 49 U.S.C. 66, of the overpayments made by Commodity Credit Corporation with regard to transportation services performed for Commodity by petitioner was not time-barred by Section 4(c) of the Commodity Credit Corporation Charter Act of 1948, 15 U.S.C. 714b(c).

2. Whether the Court of Appeals properly rejected petitioner's claim, raised for the first time in the litigation on its second petition for rehearing in the Court of Appeals, that a tariff classification question with regard to a shipment of Air Force boxes should have been referred to the Interstate Commerce Commission under the doctrine of "primary jurisdiction".

STATUTES INVOLVED

Section 322 of the Transportation Act of September 18, 1940, 54 Stat. 955, 49 U.S.C. 66, provides as follows:

> Payment for transportation of the United States mail and of persons or property for or on behalf of the United States by any common carrier subject to the Interstate Commerce Act, as amended, or the Civil Aeronautics Act of

1938, shall be made upon presentation of bills therefor, prior to audit or settlement by the General Accounting Office, but the right is hereby reserved to the United States Government to deduct the amount of any overpayment to any such carrier from any amount subsequently found to be due such carrier.

Section 4 of the Commodity Credit Corporation Charter Act of June 29, 1948, 62 Stat. 1070, as amended, 15 U.S.C. 714b, provides in relevant part as follows:

The Corporation—

* * * *

(c) May sue and be sued, but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Corporation or its property. * * * No suit by or against the Corporation shall be allowed unless (1) it shall have been brought within six years after the right accrued on which suit is brought, * * *. The defendant in any suit by or against the Corporation may plead, by way of set-off or counterclaim, any cause of action, whether arising out of the same transaction or not, which would otherwise be barred by such limitation if the claim upon which the defendant's cause of action is based had not been barred prior to the date that the plaintiff's cause of action arose: *Provided*, That the defendant shall not be awarded a judgment on any such set-off or counterclaim for any amount in excess of the amount of the plaintiff's claim established in the suit. * * * Any suit by or against the United States as the real party in interest based upon

any claim by or against the Corporation shall be subject to the provisions of subsection (c) of this section to the same extent as though such suit were by or against the Corporation, except that (1) any such suit against the United States based upon any claim of the type enumerated in section 1491 of Title 28, may be brought in the United States Court of Claims, * * *.

* * * *

(k) Shall have authority to make final and conclusive settlement and adjustment of any claims by or against the Corporation or the accounts of its fiscal officers.

* * * *

STATEMENT

This action was instituted by petitioner, Missouri Pacific Railroad Company,[1] under the Tucker Act, 24 Stat. 505, as amended, 28 U.S.C. 1346(a)(2), to recover certain amounts which had been deducted in the payment of bills rendered by petitioner in connection with transportation services performed for the Government in 1953 (R. 3-6). These deductions had been made pursuant to the provisions of Section 322 of the Transportation Act of 1940, *supra*, pp. 2-3, and had stemmed from a determination by the Comptroller General that petitioner had overcharged the Government on certain earlier shipments, the bills for

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[1] The action was actually commenced by Guy A. Thompson, Trustee of the Beaumont, Sour Lake and Western Railway Co. (R. 3). On March 1, 1956, the trusteeship was terminated and all of its assets and liabilities were transferred to petitioner (R. 13). On February 6, 1957, petitioner was substituted as party-plaintiff (R. 27).

which had been paid upon presentation without prior audit (R. 7-12). The case was submitted to the district court on stipulated facts (R. 13-21). Judgment for petitioner in the district court (R. 28-29) was reversed on appeal by the Court of Appeals (Pet. App. A; 250 F. 2d 805).

Petitioner's contentions here are limited to only two of the three series of shipments in dispute below. The pertinent facts concerning them may be summarized as follows:

1. *Transportation of foodstuffs for Commodity Credit Corporation.* The Commodity Credit Corporation shipped foodstuffs from various points of origin to Beaumont, Texas, for export (R. 18). The bills were paid upon presentation from funds of Commodity Credit Corporation (R. 18). More than six years later, following a determination of overpayment by the General Accounting Office, the deductions authorized by Section 322 were made from 1953 bills submitted by petitioner (R. 18).

Petitioner contended in the district court that it had not overcharged the Government (R. 18). It further argued that, in any event, the deduction of the alleged overpayment more than six years after its original bills had been paid was precluded by Section 4(c) of the Commodity Credit Corporation Charter Act of 1948, as amended, 15 U.S.C. 714b(c), *supra*, pp. 3-4 (R. 18). The district court agreed with the latter contention, and, therefore, did not pass upon the merits of the deduction (R. 25).

In reversing, the Court of Appeals stated that it

was in complete agreement with the decision of the United States Court of Claims in *Union Pacific Railroad Co.* v. *United States*, 147 F. Supp. 483, certiorari denied, 353 U.S. 950, involving precisely the same question. The Court of Appeals, in adopting the reasoning of the *Union Pacific* decision, ruled in effect that the limitation provisions of Section 4(c) did not encompass the administrative settlement procedure established under Section 322 of the Transportation Act of 1940.

2. *Transportation of Air Force Boxes.* The Government shipped from St. Louis to Houston nine carloads of its property described in the bills of lading as "Item No. 1, Case, Shipping. Air Force Organization Equipment (Shipping boxes, wooden, Chemically hardened fibre boxes)" (R. 16). Each case consisted of four nested containers made of 3/8-inch plywood (R. 16-17). The inside and outside of each container was covered with .018-inch vulcanized fibre attached to the plywood with a water-resistant glue (R. 17).

Petitioner computed its charges and was paid upon the presentation of its bill, on the basis of the applicability of the description "baskets (Boxes) or Hampers: Chemically hardened fibre" contained in Consolidated Freight Classification No. 15 (R. 17). On the post-audit, the General Accounting Office determined that the articles were ratable in exceptions to the classification in Southwestern Lines Tariff No. 173-Q, I.C.C. No. 3584, under the description "Boxes, wooden, noibn" (R. 17).[2] On the basis of that de-

[2] The term "noibn" means "not otherwise indexed by name in the classification" (R. 17).

termination, the General Accounting Office concluded that the Government had been overcharged and, accordingly, made deductions under Section 322 from petitioner's 1953 bills (R. 16, 17).

The district court found that the shipping cases were "identical in all material characteristics with boxes made entirely of chemically hardened fibre" (R. 23) and thus concluded that they came within Consolidated Freight Classification No. 15 (R. 24). On appeal, the Court of Appeals reversed. Pointing to the principle of tariff construction that a tariff is to be given that meaning which its terms would reasonably convey to the shipper, and that any ambiguity in meaning must be resolved against the carriers, the court held that the boxes involved were ratable as wooden boxes, not otherwise indexed by name, since the tariffs under construction "on their face admit of no other reasonable conclusion" (Pet. App. A, p. 15).

Subsequently, petitioner filed two petitions for rehearing in the Court of Appeals (Pet. 3). The first, which was denied without opinion on March 12, 1958, challenged, *inter alia*, the holding of the court with regard to classification of these boxes. The second petition, filed on March 21, 1958, raised for the first time in the entire litigation the contention that the tariff classification question should have been referred to the Interstate Commerce Commission under the doctrine of "primary jurisdiction". On May 22, 1958, this petition was also denied without opinion.

ARGUMENT

1. The Court of Appeals correctly held that the limitation provisions of Section 4(c) of the Commodity Credit Corporation Charter Act, *supra*, pp. 3-4, are not applicable to administrative deductions made under Section 322 of the Transportation Act of 1940, *supra*, pp. 2-3. Petitioner's argument here is primarily an attack on the decision of the Court of Claims in *Union Pacific Railroad Co.* v. *United States*, 147 F. Supp. 483, certiorari denied, 353 U.S. 950, which resolved the same question in the Government's favor and with which the court below was in complete agreement. The contentions made by petitioner here are essentially the same as those raised in the unsuccessful attempt to obtain review by this Court in *Union Pacific* and are equally lacking in merit.[3]

(a) As this Court has observed, Section 322 was designed, on the one hand, to give the carrier the benefit of immediate payment, and, on the other, to enable the Government to put itself in *statu quo ante* with respect to those matters as to which subsequent audit showed error or probability of error. See *United States* v. *N.Y., N.H. & H.R. Co.*, 355 U.S. 253, 260; cf. *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, 74. This desire to insure that the prompt payment of transportation bills would not have a prejudicial effect upon the public treasury sufficiently explains, we think, the absence of a limitations period provision in Section 322. As the Court

[3] See the petition for a writ of certiorari and the brief in opposition in No. 859, Oct. T., 1956, *Union Pacific Railroad Co.* v. *United States.*

of Claims observed in *Union Pacific*, were administrative recoupment barred unless effectuated during the period for which petitioner here contends, the Government would be unable to protect itself against the retention by the carrier of excessive and unlawful charges.

(b) Petitioner urges, however, that, even though there is no limitation upon administrative recoupment of overcharges under Section 322, Section 4(c) of the Commodity Credit Corporation Charter Act, *supra*, pp. 3-4, imposes a six-year time limit upon such recoupment where the transportation services had been performed for Commodity. No explanation is offered, however, as to how a limitation provision which refers solely to the institution of *suits* by or against Commodity can be read as encompassing administrative settlements as well. Such an extension of a limitations provision beyond the statutory terms is foreclosed not only by this Court's decision in *Du Pont de Nemours & Co.* v. *Davis*, 264 U.S. 456, 462, but also by Section 4(k) of the Charter Act. This section, conferring authority on Commodity to settle any claims by or against it, like Section 322 of the Transportation Act, contains no time limitation.

Nor is petitioner's cause advanced by its reliance upon the provision in Section 4(c) authorizing the assertion, by way of set off or counterclaim, of causes of action which had not become time-barred prior to the date that the plaintiff's cause of action arose. This provision neither purports to have, nor does have, any bearing upon administrative settlements undertaken under Section 322 of the Transportation

Act or Section 4(k) of the Charter Act. Rather, as is true of the balance of Section 4(c), it relates only to the circumstances in which judicial enforcement of a cause of action may be obtained. The Government is, of course, not seeking in this litigation to enforce any claim against petitioner. Instead, like the carrier in *Union Pacific*, petitioner is asserting a purported cause of action arising out of the Section 322 deduction made from its 1953 bills.

2. With respect to the refusal of the Court of Appeals to refer the question of the correct tariff classification of the Air Force boxes to the Interstate Commerce Commission, petitioner urges the existence of a conflict with the decision of this Court in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59. It is doubtful that this contention is open to petitioner. Its request for referral was made for the first time on its second petition for rehearing in the Court of Appeals. Until that advanced point in the litigation, petitioner, in agreement with the Government, had urged the district court and the Court of Appeals that the tariff classification question presented was one singularly appropriate to judicial interpretation in the first instance. Petitioner's belated effort to undo the decision of the court below by reversing positions on the "primary jurisdiction" question was clearly subject to denial as untimely. In any event, the decision below was manifestly correct on the merits and in accord, rather than in conflict, with the principles reiterated by this Court in *Western Pacific*.

(a) Prior to the filing of its second petition for rehearing in the Court of Appeals, petitioner had con-

sistently urged that the question concerning tariff classification of the Air Force boxes was one appropriate for judicial interpretation. In the stipulation before the district court (R. 13-20), there was not the least suggestion of facts that would render reference to the Interstate Commerce Commission either desirable or necessary. On the appeal from the determination of that court in petitioner's favor, both parties again regarded the issue as being wholly appropriate for judicial resolution. And finally, in its first petition for rehearing, following the reversal, petitioner once again did not question the propriety of judicial action, but, to the contrary, restricted itself to the assertion that the Court of Appeals should have held that the higher rate was applicable. Only when the Court of Appeals denied the first petition for rehearing, did petitioner view the issue as one which the Interstate Commerce Commission alone could resolve.[4]

As this court observed in *Western Pacific*, however, the "primary jurisdiction" doctrine does not affect the existence or non-existence of jurisdiction in the conventional sense. 352 U.S. 59, 63-65. Rather it has reference solely to the allocation, as between court

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[4] It is to be noted that the decision in *United States* v. *Western Pacific Railroad Co.*, 352 U.S. 59, was announced on December 3, 1956. The judgment of the district court herein was filed on February 6, 1957 (R. 28). Thus, the petitioner's principal brief on appeal and its first petition for rehearing were both filed subsequent to the *Western Pacific* decision. The second petition for rehearing, which for the first time raised the primary jurisdiction issue, was not filed until March 21, 1958 (Pet. 2), over 15 months after the *Western Pacific* decision.

and administrative tribunal, of questions which are present in a suit over which the court has jurisdiction. Petitioner's assertion that the question of the applicability of the "primary jurisdiction" doctrine may be raised as a jurisdictional issue at any time in the litigation is thus without merit. The district court had jurisdiction over the action and, if petitioner was of the view that there was occasion for application of the judicially formulated doctrine of "primary jurisdiction", it was incumbent upon it to raise that claim in the trial court.[5]

In short, no jurisdictional considerations precluded a refusal on the part of the Court of Appeals, in the sound exercise of its discretion, to permit petitioner to repudiate its consistent previous position at the remote stage of a second petition for rehearing. And, we submit, the interests of orderly judicial administration were best served by the denial of that petition. Having elected to submit the tariff construction question to the district court for decision, and having urged without qualification in defense of the appeal that the district court's determination should be affirmed, petitioner had had its day in court.

(b) In any event, there is no merit to petitioner's assertion that the tariff classification question called

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[5] Petitioner is mistaken in its assertion (Pet. 6) that in *Western Pacific* this Court *sua sponte* directed a referral to the Interstate Commerce Commission. As the opinion of the Court in that case indicates (352 U.S. at 61-62), the United States expressly requested the Court of Claims to make such a referral of the issue of reasonableness. This Court held that the issue to be referred to the Commission was of broader scope.

for Commission resolution. As this Court has long recognized, "what construction shall be given to a railroad tariff presents ordinarily a question of law which does not differ in character from those presented when the construction of any other document is in dispute". Further, "[w]hen the words of a written instrument are used in their ordinary meaning, their construction presents a question solely of law." *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U.S. 285, 291; see also *United States* v. *Missouri-Kansas-Texas R. Co.*, 194 F. 2d 777, 778 (C.A. 5). Giving effect to this principle, this Court and other courts have on innumerable occasions undertaken to resolve, without resort to the Interstate Commerce Commission, disputes between shippers and carriers as to which of two tariff classifications governed the transportation of a particular commodity.[6]

Contrary to petitioner's seeming belief, the decision in *Western Pacific* in no way represents a departure from this established principle. Reference of the tariff classification question to the Interstate Commerce Commission there was expressly predicated on the usage of words in the tariff "in a peculiar or technical sense * * * where extrinsic evidence is neces-

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[6] See, *e.g.*, *United States* v. *Gulf Refining Co.*, 268 U.S. 542; *West Coast Products Corp.* v. *Southern Pacific Co.*, 226 F. 2d 830 (C.A. 9); *Sonken-Galamba Corp.* v. *Thompson*, 225 F. 2d 608 (C.A. 10); *Chicago B. & Q. R. Co.* v. *United States*, 221 F. 2d 811 (C.A. 7); *Atlantic Coast Line R. Co.* v. *Atlantic Bridge Co.*, 57 F. 2d 654 (C.A. 5); *American Ry. Express Co.* v. *Price Bros.*, 54 F. 2d 67 (C.A. 5).

sary to determine their meaning or proper application." 352 U.S. at 65, 66. The Court pointed to the presence of "[c]omplex and technical cost-allocation and accounting problems" and other factors "the adequate appreciation of which" presupposed an "acquaintance with many intricate facts of transportation." *Ibid.* Moreover, the Court carefully reiterated its adherence to the principle of *Great Northern R. Co.*, *supra*, p. 13, that, where construction of the tariff does not involve technical problems requiring application of agency expertise, the question is appropriate for judicial interpretation in the first instance. 352 U.S. at 65-69.

None of the considerations underlying the reference in *Western Pacific* is present here. As evidenced by the presentation in the stipulation of facts, the words of the tariff classifications involved were not used in any peculiar, technical sense beyond the competence of the court, nor does the issue presented presuppose an acquaintance with such factors as complex cost-allocation and accounting problems. Unlike the factual situation in *Western Pacific*, where the tariff did not provide a rate on non-incendiary bomb cases filled with napalm gel, the tariff under construction here certainly provided rates for different types of boxes. In our view, the Court of Appeals correctly determined that the boxes clearly fell under the classification of wooden boxes, not otherwise indexed by name. In any case the resolution of the question did not necessitate resort to the Interstate Commerce Commission under the criteria enunciated by this Court in *Western Pacific*.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

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